IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISCELLANEOUS APPLICATION NO. 106 OF 2005

Berger Paints India Ltd.
a registered company,
having its registered office
at Berger House, 129,
Park Street, Calcutta-700017
Through its Regional Admn.
Manager, Mr.S. Balakrishnan,
Aged about 50 years. ... Applicant

versus

1. Mr. Asif Ahmed
   Aged about 32 yerars
   M/s Royale Enterprises
   M/s Goa Lime Industries
   Khareband, Margao, Goa
   403 601.

2. State(through Public Prosecutor). ... Respondents

Mr. P. A. Kholkar with Mr. Anand Redkar, Advocates for the Applicant.

Mr. Arun Bras De Sa, Advocate for Respondent No.1.

Mr. S. N. Sardessai, Public Prosecutor for Respondent No.2.

CORAM : N. A. BRITTO, J.

DATE : 1ST SEPTEMBER,2005.

ORAL ORDER

The accused having been acquitted under Section 138 of the Negotiable Instruments Act, 1881(Act, for short) in C.C. No.48/OA/NI/2003/A by the Order of the Chief Judicial Magistrate, Margao, dated 23-2-2005, the complainant is before this Court seeking leave to appeal against the said acquittal.

2. The case of the complainant was that he had a depot towards the supply of paints and in consideration of supply made to the accused, the accused had issued two cheques dated 10-6-2002 and 20-6-2002 for Rs.50,000/- each drawn on Goa Urban Co-operative Bank Limited and when the said cheques were presented for payment, the same were not honoured and were returned with endorsement that the payment was stopped by the drawer. It was the case of the complainant that a legal Notice dated 5-12-2002 was issued to the accused which the accused received on 7-12-2002.

3. In support of its case, the complainant had filed an affidavit in evidence of its Regional Commercial Manager who was cross-examined on behalf of the accused. Unfortunately for the complainant, the complainant chose to authorise the said Regional Commercial Manager to depose on behalf of the complainant and who knew nothing, as his cross-examination shows, about any transaction having taken place between the complainant and the accused except that one Mr. Kambli who was one of the persons working at the supply depot, had handed over the said cheques to him.

4. At the hearing, Mr. Kholkar, the learned Counsel appearing on behalf of the complainant has submitted that there is a presumption available in favour of the complainant that in terms of Section 139 of the Act to the effect that the cheque was issued for discharge, in whole or in part for a debt and other liability and to support the said submission, Mr. Kholkar, the learned Counsel has placed reliance in the case of **K. N. Beena** v. **Muniyappan and another** (AIR 2001 SC 2865).

5. On the other hand, Mr. Bras De Sa, the learned

Counsel appearing on behalf of the accused has submitted that this is a case where the complainant has not been able to prove that a notice of demand as required under Section 138 of the Act was issued to the accused and unless it was proved that a notice was served upon the accused and the accused had failed to make the payment within 15 days of the receipt of the notice, no offence against the accused could have been made out.

6. There is no doubt that there is a presumption in favour of the holder of a cheque in terms of Section 139 of the Act that the said cheque was issued for the discharge, in whole or in part of any debt or other liability. In fact, the Act has contemplated three sets of presumptions including those of Section 118, namely, that until the contrary is proved a negotiable instrument was made for consideration, the other being under Section 138 in terms set out in the said Section. However, we find that the complainant in this case did not know anything about the transaction between the complainant and the accused except that the said Mr. Kambli had handed over to him the said two cheques being the subject matter of the said complaint. In cross-examination, he had stated that he did not

know who had written the said cheques; that he did not know on what date they were given to Mr. Kambli; that he did not know whether the Company had taken any blank cheques from the accused. He had admitted that the Company had supplied a machine to the accused and the same was taken back by the Company and that there was an agreement to that effect. He had also stated that he did not know whether the Company had taken sixty blank cheques from the accused. He was asked whether the two cheques, the subject matter of the case formed part of the said sixty cheques and he answered by stating that they did not form part of the said case. From the cross-examination of P.W.1, S. Balakrishna it is not possible to know whether the suit cheques were given in payment of any debt or whether they were given as security for the supply of machine and, therefore, no presumption as otherwise available could be drawn in favour of the complainant. All that P.W.1, S. Balakrishna knew was that the said cheques were handed over to him by Mr. Kambli and Mr. Kambli was not examined.

7. As rightly submitted by Mr. Bras De Sa, this is a case where the complainant failed to prove that the complainant had

served a notice of demand on the accused and the accused had failed to make the payment within 15 days of the said notice, that being one of the essential ingredients for completion of offence under Section 138 of the Act. The complainant did state in his affidavit in evidence that a legal notice dated 5-12-2002 was issued to the accused which the accused had received on 7-12-2002. Now a days, more often than not it is said that the statements made in an affidavit are attributable to draftsman of the said affidavit and not to the person who swears them and who actually is supposed to make them in the affidavit. However, in the cross-examination P.W.1, S. Balakrishna, admitted that he did not know whether the accused had received the demand notice thereby nullifying as to what he had stated in his affidavit-examination-in-chief. The complainant did produce a copy of the notice dated 5-12-2002 and along with it a receipt from Fast Track Courier Service. Mr. Bras De Sa, submits that the accused has taken a defence in his statement recorded under Section 313 of the Code of Criminal Procedure, 1973(Code, for short) that he had not received the said notice. Mr. Bras De Sa, has next submitted that even this Court could compare the signature of the accused as seen on the said receipt of the said Fast Track Courier Service

and the signature of the accused on the admitted documents particularly on the statement recorded under Section 313 of the Code, on the records and proceedings of the learned Chief Judicial Magistrate, Margao and arrive at its own conclusion. Though, such a course could be followed, I need not enter into the said controversy in the light of the admission made by P.W.1/S. Balakrishna in his cross-examination and the said receipt of Fast Track Courier Service having not been proved by the complainant by examining the person who has delivered the notice to the accused and in token thereof had taken the signature of the accused at the place where it is shown. Suffice it to observe that the complainant has failed to prove that any notice of demand was served on the accused that being one of the ingredients of offence which the complainant was required to prove in terms of Clauses (b) and (c) of Section 138 of the Act. There is no question of drawing any presumption that the notice was served because the notice was not sent by registered post with acknowledgement due.

8. In view of the above, this is not a fit case to grant leave to appeal. Hence, the application is hereby rejected.

N. A. BRITTO, J.

RD.